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No. 91-112

In The Supreme Court of the United States

OCTOBER TERM, 1991

BUDDY CRAMER, PETITIONER

v.

SAMUEL K. SKINNER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

Respondents, the National Government, argue in their Brief for the Respondents in Opposition ("Resp. Br. Opp.") that the court of appeals "*had no jurisdiction*" to consider the constitutionality of the Wright Amendment, "because denials of summary judgment motions are not appealable." Resp. Br. Opp., at 5. (Emphasis added.) The National Government argues that, because the court of appeals "had no jurisdiction" to consider the constitutionality of the Wright Amendment, this Court should deny the

instant petition for a writ of certiorari (hereinafter the "Petition"). *Id.* The National Government does not appear to question the jurisdiction of the court of appeals over the appeal, itself, but instead asserts only that the court of appeals was without jurisdiction to address the merits of Petitioner's claims. (*Cf.: Ben Cooper, Inc.* v. *Insurance Company of Pennsylvania,* 924 F.2d 36, 38 (2d Cir. 1991), *certiorari denied,* 111 S.Ct. 425 (1991), in which Solicitor General Starr successfully argued that an interlocutory order "merged into the final judgment and thus became reviewable.")

Assuming, *arguendo,* the court of appeals exceeded its jurisdiction in declaring the Wright Amendment to be constitutional, it does not follow that this Court should deny the Petition. This Court may instead: (1) grant the writ sought by the Petition, (2) vacate the judgment of the court of appeals, and (3) remand this case to permit the court of appeals to address the jurisdictional issue. See, *e.g., Ben Cooper, Inc.* v. *Insurance Company of Pennsylvania,* 111 S.Ct. 425 (1990), *upon remand,* 924 F.2d 36 (2d Cir. 1991), *certiorari denied,* 111 S.Ct. 425 (1991) (in which this Court vacated the judgment of a court of appeals and remanded for consideration of a jurisdictional issue). Such disposition of the instant case would afford Petitioner an opportunity to have the merits of his claims adjudicated by a court of competent jurisdiction — an opportunity which the National Government freely admits Petitioner has not yet had.

If this Court were to deny the writ sought by the Petition, the National Government would undoubtedly argue in the courts below that both the district court,

and the court of appeals following remand, would be bound by the law of the case doctrine to adhere to the opinion of the court of appeals below (hereinafter the "May 9, 1991 Opinion") which, *inter alia*, declared the Wright Amendment to be constitutional. Various Fifth Circuit panels have differed as to whether they had power to reopen any issue following remand. See, *e.g., Drachenberg,* etc. v. *Canal Barge Company, Inc.*, et al., 621 F.2d 760, 762 (5th Cir. 1980), *rehearing denied,* 626 F.2d 172, *following remand,* 642 F.2d 823. (Court of appeals is "without power" to overrule the law of the case.) *Cf.: Lehrman* v. *Gulf Oil Corporation,* 500 F.2d 659, 662 n. 1 (5th Cir. 1974), *rehearing denied,* 503 F.2d 1403, *certiorari denied,* 420 U.S. 929 (1975). ("[I]t is within the[] power" of courts of appeals to reopen issues decided prior to remand.) The National Government's argument that relief by this Court is unnecessary because Petitioner may simply perfect an appeal from a final decision of the trial court (Resp. Br. Opp., at 5) fails to take into account the law of the case doctrine, and the reality that this Court is apparently Petitioner's only potential source of relief.[1]

Denial of the writ sought by the Petition would allow the National Government to continue to assert

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1 Even the issue of the first panel's jurisdiction might be foreclosed in the court of appeals following remand. The National Government would argue that the May 9, 1991 Opinion contains an implied finding that the court of appeals had jurisdiction to declare the Wright Amendment constitutional. Several Fifth Circuit panels have held that implied findings are within the scope of the law of the case doctrine. See, *ex rel., Morrow, et al. v. Dillard,* etc., et al., 580 F.2d 1284, 1290 (5th Cir. 1978).

the May 9, 1991 Opinion for its *stare decisis* effect. The National Government currently relies heavily upon the May 9, 1991 Opinion in at least one other pending civil action in which the validity of the Wright Amendment is challenged. (State of Kansas, *et al.* v. United States of America, *et al.*, Civil Action No. 91-0233-TFH, in the United States District Court for the District of Columbia; nowhere in its briefing in said case does the National Government question the jurisdiction of the court of appeals to render all or part of its May 9, 1991 Opinion.) It would be most unfortunate if other federal courts were to defer to the May 9, 1991 Opinion, if in fact such opinion was rendered in the absence of jurisdiction.

If this Court is reluctant to grant the writ sought by the Petition because of what the National Government terms the "peculiar, interlocutory posture of this case" (Resp. Br. Opp., at 5), it does not necessarily follow that this Court need deny the Petition.[2] Instead, this Court may defer consideration of the Petition until the district court below and the court of appeals enter dispositive orders consistent with the May 9, 1991 Opinion, and permit Petitioner to file a supplemental appendix containing such orders.

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2 Because the sole function remaining for the trial court is entry of judgment, and because reopening of issues following remand appears unlikely, Petitioner disputes the National Government's characterization of the judgment of the court ofappeals as "interlocutory". In the context of state court judgments, this Court has recognized that a judgment is "final" where "for one reason or another ... the outcome of further proceedings [is] preordained." *Cox Broadcasting Corporation*, et al., v. *Cohn*, 420 U.S. 469, 479 (1975).

CONCLUSION

The petition for a writ of certiorari should be granted at this time. Alternatively, this Court may defer consideration of the Petition and permit Petitioner to file a supplemental appendix containing dispositive orders by the district court below and the court of appeals.

Respectfully submitted.

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